SUPREME COURT, U.S.

No. 968

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

v.

NORTON COMPANY,
STUDEBAKER-PACKARD CORPORATION,
HADCO CORPORATION,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI BY MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER.

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CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI BY MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER.

Petitioner, Minnesota Mining and Manufacturing Company, prays that this Court direct its writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment—which has serious consequences for the patent law—entered in Cause No. 18,596 on the docket of that court. In support of its petition, Minnesota Mining (sometimes referred to as Minnesota, or as 3M) says:

OPINIONS BELOW.

The opinions in the courts below leading to the judgment tendered for review are:

Opinion of the United States Court of Appeals for the Sixth Circuit in *Minnesota Mining and Manufacturing Company v. Norton Company, Studebaker-Packard Corporation and Hadco Corpora-*

tion (6 C.A. 1970), 426 F.2d 1117 (by Judges O'Sullivan, Edwards and Combs), holding U.S. patent No. 2,958,593—covering an immensely important invention—invalid by application of erroneous standards in adjudging the discovery "obvious" under 35 U.S.C. 103. The opinion is reproduced in the Appendix hereto, printed under separate cover, page 1.

Opinion of the United States District Court for the Northern District of Ohio in *Minnesota Mining and Manufacturing Company v. Norton Company, Studebaker-Packard Corporation and Hadco Corporation* (N.D., Ohio, 1967), 280 F. Supp. 674, entered by Judge Green, holding that the patent, although found to satisfy every other requirement of the patent law, is invalid as "obvious"—even though the accused infringer, Norton Company, the principal competitor of Minnesota Mining in the area of the patent, found it impossible to reproduce the 3M product short of 13 months even when it had the article in hand, but lacked the teaching of the patent—for the patent was not to issue for another two years and nine months. The opinion is reproduced in the Appendix hereto, page 15.

Opinion of the District Court overruling the motion by Minnesota Mining for a new trial and to amend the findings (on the ground that certain findings challenged by 3M are erroneous) is reported in 280 F. Supp. 697. The District Court held the judgment "was not controlled by, or motivated by," the challenged findings. The opinion is reproduced in the Appendix, page 58.

The findings relied upon by the courts below thus are not challenged,—only the conclusions drawn and the standards applied. However, there is an erroneous absence of any finding concerning "the level of ordinary skill in the pertinent art."

JURISDICTION.

The judgment sought to be reviewed is dated, and was entered, June 1, 1970. It is reproduced in the Appendix, page 11.

Petition for rehearing was denied by order dated, and entered, August 25, 1970, reproduced in the Appendix, page 13. The court's order directing Respondents Norton, *et al.* to file a brief in response to 3M's petition for rehearing was entered June 19, 1970. It is reproduced in the Appendix, page 12.

This Court has jurisdiction to review upon petition for writ of certiorari pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

This case brings here for review questions immensely important to the development of the patent law, *viz.*:

1. Whether the court below laid down improper standards in adjudging the invention "obvious" under 35 U.S.C. 103.
2. Whether an invention may be adjudged "obvious" without consideration of, or findings determining, the "level of ordinary skill in the pertinent art."
3. Whether an invention may be adjudged "obvious" where (a) need for the invention had long existed, (b) materials and machinery to produce the product had been available for many years, and (c) the accused infringer, the world's largest producer of devices in the area covered by the pat-

ent, found it impossible to reproduce the patented article short of 13 months after it had the product in hand, and lacked nothing but the teaching of the patent (which had not yet issued) even though it assigned a team of nine experienced research men to the task.

4. Whether an accused infringer's representations (a) to the public concerning the "revolutionary" character of the product, and (b) to the Patent Office in seeking to patent improvements on the product, may be disregarded in determining whether the invention would be "obvious" to one having the statutory "ordinary" skill in the art.

STATUTE AND CONSTITUTION.

Both courts below held the patent meets every test but one. Both held the patent satisfies the tests of novelty and utility under 35 U.S.C. 101 and 35 U.S.C. 102, but incorrectly held the patent invalid under 35 U.S.C. 103 on the ground the invention was "obvious." The governing statute thus is 35 U.S.C. 103. That statute—with its here relevant parts italicized—says:

> "A patent may not be obtained * * * *if the differences between the subject matter sought to be patented and the prior art* are such that the subject matter as a whole *would have been obvious* at the time the invention was made to a person *having ordinary skill in the art* to which said subject matter pertains. * * *." 35 U.S.C. 103.[1]

Also relevant is Article I, Section 8, Clause 8 of the Constitution. It directs Congress:

> "To promote the Progress of * * * useful Arts, by securing for limited Times to * * * Inventors the exclusive Right to their * * * Discoveries."

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[1] Emphasis supplied throughout.

STATEMENT OF THE CASE.

This is a patent case brought in the United States District Court in Cleveland pursuant to 35 U.S.C. 1338.

The invention covered by the patent, U.S. 2,958,593, generally referred to in the record as the Hoover patent, is the work of three inventors, Howard L. Hoover, Eugene J. Dupre and Walter J. Rankin, and by them assigned to petitioner, Minnesota Mining and Manufacturing Company.

The three accused infringers are the Norton Company, which manufactures the accused product through its Behr-Manning Division (and markets it under the "BEAR-TEX" label), Studebaker-Packard Corporation and Hadco Corporation, distributors.

—Nature of the Invention.

The invention has enjoyed spectacular success in the market place—if not in the courts of the Sixth Circuit—and has won acclaim throughout so much of the world as is open to American commerce. Patents on the invention have been allowed in 16 foreign countries.[3]

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[2] In contrast to the fate of the patent here, patents granted abroad on the Hoover invention have been upheld in two suits in France, in adversary litigation, by the court of first instance, by the Court of Appeals, and by the *Cour de Cassation*, the highest court in France, and by judgment entered by consent in settlement of a suit in England, wherein the accused infringer acknowledged the validity of the patent and admitted infringement. No adverse decision has been returned in any foreign country.

[3] Patents on the Hoover invention have been allowed, following examination, in Australia, Brazil, Canada, England, Germany, Japan, New Zealand and Sweden. Patents have also been granted in Argentina, France, Greece, Italy, South Africa, Spain, Switzerland, and Venezuela. Patent coverage has not been denied in any foreign country.

The trial court correctly found—and the Court of Appeals agreed—"there were no prior commercial products constructed exactly as plaintiff's [3M's] 'Scotch-Brite' line;" they were, along with Norton's accused "Bear-Tex" products, "commercial successes" and enjoyed "vast acceptance." 280 F. Supp. at 693, Appendix pages 53-54. They thus filled a need that long had existed.

The trial court further held—and the Court of Appeals agreed—that the 3M product "represented the first commercial embodiment of abrasive grain to an extremely open, lofty, three-dimensional" web. 280 F. Supp. at 691, Appendix page 50.

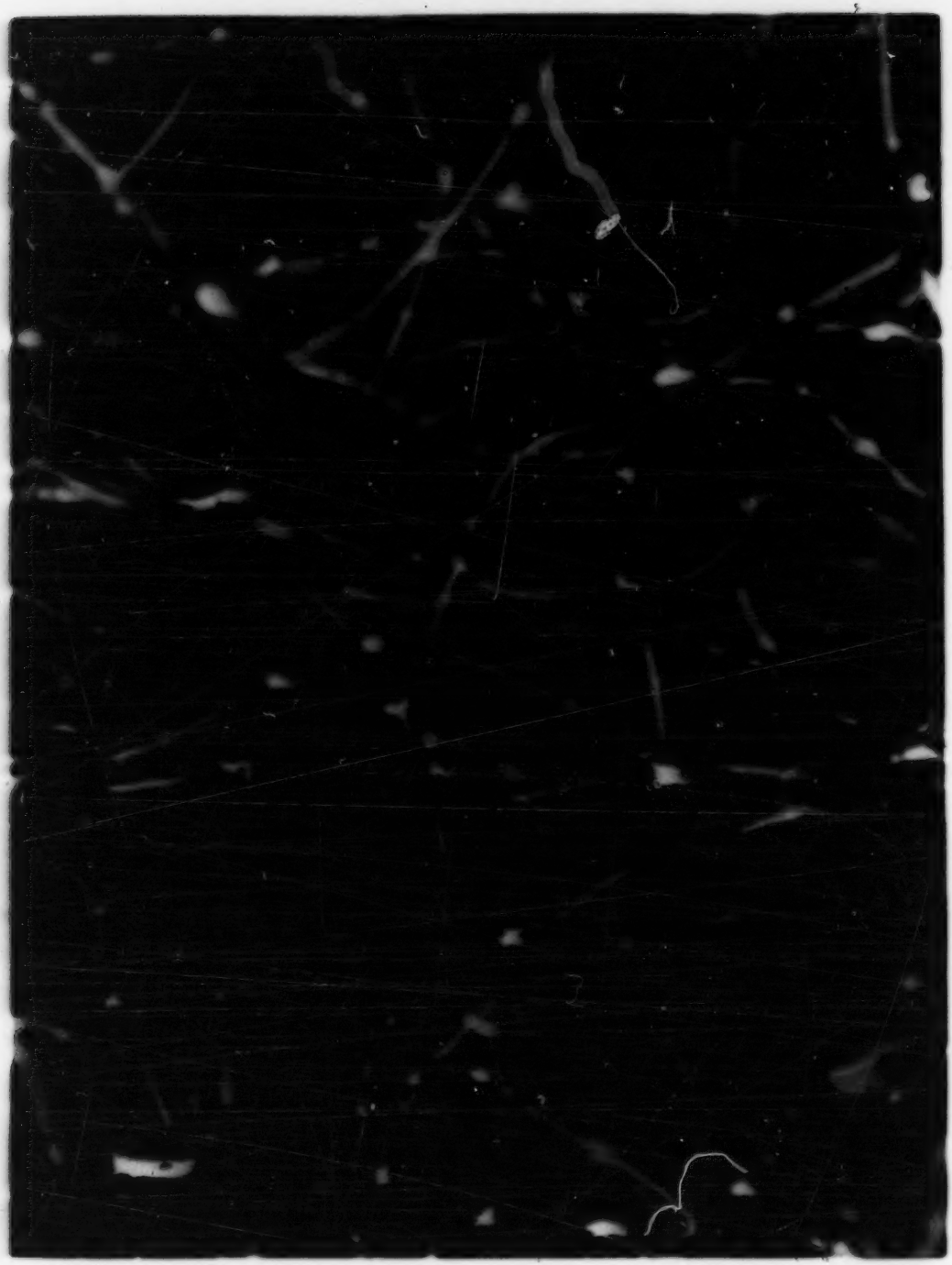
—The Hoover Structure.

The Hoover product, in the jargon of the patent law, is a "low density open non-woven fibrous abrasive article." It is a product made in various forms, shapes, and sizes, for a variety of uses in the abrasives field. It is used principally in industrial metal finishing, polishing and buffing operations, in cleaning mill scale in steel making, in cleaning operations in the dairy industry and in hospitals, in floor maintenance in office and public buildings, and as a scouring pad in the household and kitchen. 426 F.2d at 1119, Appendix page 3.

Abrasive granules are suspended in a network of fibers—nylon or polyester, for example, or other materials —held in place by adhesives in the fashion shown in the photographic enlargement opposite.

HOOVER STRUCTURE.

Photograph Taken From the Patent in Suit.



The patent was held invalid by the courts below on the sole ground that the invention "*should have been obvious*" to the "ordinary" worker. 280 F. Supp. at 681, Appendix, page 29. This was the result below only because—

—Erroneous Standards Were Applied.

The damage done the patent law by the decision below, adjudging the invention "obvious," is revealed by matching the standards applied by the court below with the statutory standard declared by 35 U.S.C. 103 and stated by other United States Courts of Appeals. The statute invalidates a patent—if it satisfies all other tests, as does the patent in suit, as both courts below held—*only* if the invention:

> "*would have been obvious* * * * to a person having *ordinary skill* in the art * * *" 35 U.S.C. 103.

Now observe:

(i) Norton's skilled researchers, with the Hoover product in hand, but without the teaching of the as yet unissued patent, did not find the secret of Hoover "obvious."

Norton, untutored by the patent (which was not to issue until two years and nine months later) put a team of nine skilled researchers to work on the Hoover product —once it appeared on the market on February 1, 1958.[4]

Thirteen months later, by this crash program, the secret of Hoover was broken. Here is the interesting sequence of events—illuminating the crucial question

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[4] Assigned by Norton to unlock the secret of Hoover were: G. W. Wells, M. F. Raether, J. L. Mueller, C. E. Baldwin, M. T. Gladstone, G. L. Haywood, E. J. Keyes, Raymond R. Lucey, Mr. Pulensky, J. R. Quinan, and W. D. White. (1131a-1133a, 1277a-1289a, 1459a-1468a.)

whether the invention was adjudged "obvious" by any permissible standard:

3M put the Hoover product on the market on Saturday, February 1, 1958—two years and nine months before the patent issued. (105a.)

Three days later, on the following Tuesday, February 4, 1958, the Hoover product was in Norton's hands. In its Troy, N. Y., laboratories, Norton subjected the Hoover product to rigorous inspections and analyses. Norton's researchers recorded the results in 371 pages in 17 laboratory research notebooks and 75 memoranda. (1459a-1468a, 1277a-1289a, 1132a-1133a.)

Thirteen months later success crowned Norton's efforts. On February 25, 1959, Norton marketed its copy; on March 2, 1959, Norton made its first sale. (1129a, 209a, 293a, 1113a.) Both courts adjudged the Norton product to be "a copy of Minnesota's 'Scotch-Brite' products."[3]

November 1, 1960, a year and eight months after Norton achieved its copy, the Hoover patent issued.

Norton's copy was not the work of the statutory "person having *ordinary* skill in the art;" it was the work of the expert researchers of the self-styled biggest manufacturer of abrasive devices in the world—then more than 45 years in the business. (1290a.)

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[3] 426 F.2d at 1122, Appendix page 10; 280 F.Supp. at 694, Appendix pages 56-57.

(ii) Norton itself described its copy of the Hoover article as "revolutionary," and sought patents thereon.

Norton, prior to this litigation, did not consider the product of the Hoover invention "obvious." The Court of Appeals put it this way:

> "Norton represented to the patent office and the public that [Norton's] 'BEAR-TEX' was a revolutionary product." 426 F.2d at 1122, Appendix page 10.

The "BEAR-TEX" product marketed by Norton, the Court of Appeals identified as:

> "a copy of Minnesota's 'SCOTCH-BRITE' products." 426 F.2d at 1122, Appendix page 10.

On its copy, which Norton now contends is "obvious," *Norton sought two patents*—before the Hoover patent issued. Norton proclaimed the product "a completely new form of abrasive" (1293a) "born in the laboratories of" Norton. (1290a.)

In the first of its patent applications (Haywood application, Serial No. 782,869)—filed 22 months after the first Hoover application but before the Hoover patent issued on November 1, 1960—Norton sought a patent *on the very product disclosed in Example IV of the original Hoover application.* (1115a, 873a.)[6]

Now Norton asserts the product it then deemed an invention, was all the time "obvious," to be derived from the prior art, from which neither Norton nor anyone else was able to produce it, except by hindsight *after the Hoover article was in hand.*

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[6] In its second application (Camp application, Serial No. 22,947) Norton sought a patent on the product constructed by using *two* adhesive binders, one to bind the fibers together at their crossing points, and the other to bind the abrasives into the structure. (1135a-1141a.)

(iii) Decision below determines the invention was "obvious" without considering the critical element—the level of "ordinary skill in the art."

The "level of ordinary skill in the art" is not mentioned by either court below in adjudging the invention "obvious."

Norton—with the expertise of the world's biggest manufacturer of abrasive devices—*was not alone in trying to find the secret of Hoover*. Fiber Bond, a subsidiary of Union Carbide, also tried—before the Hoover patent issued—to reproduce the Hoover product. Fiber Bond experimented, the court found, "between the years 1958 and 1960," 280 F. Supp. at 691, 1348a, Appendix, page 49. But the secret of Hoover eluded Fiber Bond—even though *it, too, had the Hoover product in hand, and even though it owned the Maisel patent, one of the prior art patents relied on by Norton*. Fiber Bond did not succeed in reproducing the Hoover article until March 1961—*after* the Hoover patent had issued on November 1, 1960.

(iv) Invention mistakenly adjudged "obvious"—its materials were long available, but they lay unused until the Hoover invention appeared.

The court said—surprisingly, in view of the findings: "with the arrival of nylon, as an agent to replace some of the less advantageous materials used in the earlier patents, any advance made by the Hoover patent was obvious." 426 F.2d at 1119, Appendix, page 4.

Note two things:

First. The findings show nylon had for years been available to Norton when on February 4, 1958, it began its efforts to reproduce the Hoover product. *The trial court found* nylon appeared on the market *in 1939—19*

years before Norton commenced its struggle to produce its copy. 280 F. Supp. at 682, Appendix, page 30.

Nylon, the trial court further found, was available in "significant quantities" *in 1947 or 1948*—10 years before it occurred to Norton to make the product here accused as an infringement—or, according to "Another witness," in commercial quantities in "the *early* 1950's." 280 F. Supp. at 682, Appendix, page 30.

The machinery and all other ingredients utilized in the manufacture of the Hoover product had been available for even longer periods. 280 F. Supp. at 679, Appendix, pages 23-24. Uses which the product served when made available had also long existed. (45a-46a.)

Second. Nylon is not an essential ingredient of the Hoover patent; indeed, only one of the eight claims in suit specifically calls for nylon.[7] Other materials, *e.g.*, polyester fibers such as Dacron, or even horsehair, the patent discloses, are useful. (854a.)

The ingredients of the invention lay unused for Hoover's purposes—until the Hoover inventors appeared.

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[7] Claim 5. (858a.) The courts below have held that all of the claims in suit, viz., claims 1, 2, 3, 4, 6, 7, and 8, as well as claim 5, define novel and useful subject matter. "Undoubtedly the Hoover structures had novelty and utility, being the first of their exact kind." 280 F. Supp. at 681, Appendix, pages 50-51.

REASONS FOR ALLOWANCE OF WRIT.

This Court should grant the writ because:

1. Standards to determine whether an invention is "obvious" desperately need clarification. The need is illuminated by the decision below which calls "obvious" an invention that:

(a) *For 13 months baffled* the sophisticated researchers of the world's biggest manufacturer of devices in the very area to which the invention pertains—even after Norton's team of nine researchers *had the Hoover product in hand*. They knew, therefore, that the article *could* be produced. They had—and for years had had—*all* of the materials and machinery needed. They had available every patent mentioned by the courts below. They lacked only the teaching of the Hoover patent—which had not yet issued. Thus equipped, *they* did not find the solution "obvious."

(b) *Similarly baffled* another competitor, Fiber Bond, a subsidiary of Union Carbide Corporation. It owned the Maisel patent, one of the prior art patents from which the court below thought Hoover an obvious step. It, too, had the Hoover product in hand. But Fiber Bond did not succeed in making its copy until *after* the Hoover patent had issued. And, when sued for infringement in the United States District Court in Chicago, it confessed the validity of the Hoover patent and admitted infringement. Judgment was entered, by consent, upholding the patent, and a license granted at the royalty rate of 5%, plus payment for past infringement. (1257a, 1270a, 190a-192a, 205a.)

Of the efforts of Norton and of Fiber Bond, it may be said, as did Judge Learned Hand in *Van Heusen Products, Inc., v. Earl & Wilson* (S.D. N.Y., 1924), 300 Fed. 922:

> "Being the most experienced manufacturers in the art, I may safely assume that they quickly learned what was kernel and what was shell, what to discard and what to keep." 300 Fed. at 925.

Critical, in this respect, is the question whether a court may adjudge an invention "obvious" by a standard that is at odds with the experience of those expert in the art.

Reiner v. I. Leon Co., Inc. (2 C.A., 1960), 285 F.2d 501, certiorari denied (1961), 366 U.S. 929, rehearing denied (1961), 366 U.S. 978 (whose tests this Court approved in *Graham v. John Deere Co. of Kansas City* (1966), 383 U.S. 1, 36) dealt with this very question. Judge Learned Hand stated the matter this way:

> "The test laid down is indeed misty enough. It directs us to surmise what was the range of ingenuity of a person 'having ordinary skill' in an 'art' with which we are totally unfamiliar; and we do not see how such a standard can be applied at all except by recourse to the earlier work in the art, and to the general history of the means available at the time. *To judge on our own that this or that new assemblage of old factors was, or was not, 'obvious' is to substitute our ignorance for the acquaintance with the subject of those who were familiar with it.* There are indeed some sign posts: *e.g.* how long did the need exist; how many tried to find the way; how long did the surrounding and accessory arts disclose the means; how immediately was the invention recognized as an answer by those who used the new variant? In the case at bar the answers to these questions all favor the conclusion that it demanded more in-

tuition than was possessed by the 'ordinary' workers in the field." 285 F.2d at 503-504.

In view of the findings—which the Court of Appeals accepted—what *is* obvious is that no one anywhere, except the Hoover inventors, has been able to produce the Hoover article without having the Hoover article available to copy. What also *is* obvious is that the decision below gives birth to erroneous standards in adjudging the meaning of 35 U.S.C. 103.

Need for clarification is dramatized by the circumstance that had this case arisen in the 2d, 3rd, or 7th Circuits, the patent most surely would have been adjudged valid. Note the standards, incompatible with the measure applied by the 6th Circuit in this case, applied in the 2d Circuit, illustrated by:

Shaw v. E. B. & A. C. Whiting Company (2 C.A., 1969), 417 F.2d 1097, certiorari denied (1970), 397 U.S. 1076, rehearing denied (1970), 398 U.S. 954, where the court held (p. 1104) "The mere recital of the known elements in the art [which was the District Court's way of deciding the case at bar, approved by the Court of Appeals] *does not*, without more, invalidate the patent under Section 103," and

Ling-Temco-Vought, Inc. v. Kollsman Instrument Corporation (2 C.A., 1967), 372 F.2d 263, where the court deemed it significant that, as in the case at bar, the accused infringer (p. 269) "proceeded to patent several devices, two of which copy the details of Fenske," producing "an awkward position from which to attack the validity of the Fenske patent," and

in the 3rd Circuit, illustrated by:

Frank W. Egan & Company v. Modern Plastic Machinery Corp. (3 C.A., 1967), 387 F.2d 319, certiorari denied (1968), 391 U.S. 966, where the court considered significant the circumstance (differently treated in the case at bar) that the accused infringer's (p. 323) "own experts hailed the precise point of Willert's invention, the importance of the concept and its significance," calling it a "great advance," and "real breakthrough," and

Jones Knitting Corporation v. Morgan (3 C.A., 1966), 361 F.2d 451, where, as here, before the disclosure of the patent (p. 458) "two experts are unable to foresee the solution provided by the patent," and,

in the 7th Circuit, illustrated by:

Mercantile National Bank of Chicago v. Quest, Inc. (7 C.A., 1970), 166 USPQ 513, where, as here, the invention (p. 516) was "not obvious to those knowledgeable in the art since there was nothing comparable available * * * prior to the patent in issue," and

National Dairy Products Corporation v. Borden Company (7 C.A., 1968), 394 F.2d 887, certiorari denied (1968), 393 U.S. 953, where, as here (p. 891) "the Swift-Pauly workers, skilled as they were, did not hit upon the idea which is central to the Podlesak method."

In each of the cases foregoing, the patent, held invalid by the District Court as "obvious," was upheld as valid in the Court of Appeals—a result that could not have

been reached had those courts applied the standard of the 6th Circuit.

Next:

2. The invention has been adjudged "obvious" without determination, by any court, of the critical issue of the "level of ordinary skill in the art." This is in conflict with the express demand of *Graham v. John Deere Co. of Kansas City* (1966), 383 U.S. 1, 17.

The trial court made no finding on—and did not even discuss—this issue.

It, therefore, was obviously impossible for the Court of Appeals to determine, on any reasoned basis, whether the District Court was or was not right in holding the invention "obvious"—unless the Court of Appeals were to make its own finding concerning the "level of ordinary skill in the art"—*which it could readily have done, but did not do.*

The decision creates a standard that allows destruction of a patent on the ground the invention was "obvious," without consideration of one of the three primary tests made critical by *Graham*, 383 U.S. 1, 17.

Graham demands consideration of this point.

This is demonstrated by *Graham's* author, Mr. Justice Clark, sitting with the United States Court of Customs and Patent Appeals in *Application of Wiggins* (CCPA, 1968), 397 F.2d 356. Mr. Justice Clark, writing for that court, reversed the decision of the Patent Office Board of Appeals which had affirmed the examiner's rejection of patent claims on the ground the invention was "unpatentable under 35 U.S.C. § 103 in view of a literature article by Wolf and Braun * * *." 397 F.2d at 357. The court observed, "It was certainly not obvious to Wolf and Braun," 397 F.2d at 360, and reversed the Board's

decision, saying, "We find nothing in Wolf which suggests that he or any other person of ordinary skill in the art would regard" the invention obvious, and added, what is here particularly pertinent:

> "Nor apparently did the examiner and board—at least *their opinions reflect no such finding.*" 397 F.2d at 360.

That is precisely the situation here.

3. This Court should give assurance it is concerned with standards by which a meritorious patent is struck down, as well as with standards mistakenly applied to uphold an unmeritorious grant.

During the last three decades this Court has not accepted a patent case for review, absent conflict in the circuits, *except when the patent was held valid by the decision below.* The last cases accepted for review, absent conflict, where the patents involved *had been declared invalid by the decision below* are:

Radio Corporation of America v. Radio Engineering Laboratories, Inc. (1934), 293 U.S. 1;

Crown Cork & Seal Co. v. Ferdinand Gutmann Co. (1938), 304 U.S. 159;

Standard Brands, Inc., v. National Grain Yeast Corp. (1939) 308 U.S. 34.

This is the more remarkable in view of the explosion of knowledge in the same three decades. For centuries of man's life on earth, increase in man's store of knowledge came but fitfully. Since World War II man's fund of knowledge has grown enormously.

This ferment of knowledge makes it the more important that standards upholding contributions to man's welfare, in the form of inventions, be declared.

Patents are granted by the constitutional command "To promote the Progress of * * * useful Arts." The patent grant "is a deliberate creature of the Constitution and one long implemented by Congress to promote technology and encourage progress." *Commissioner of Patents v. Deutsche Gold-und-Silber-Scheideanstalt Vormals Roessler* (App. D.C., 1968), 397 F.2d 656, 663.

Rights so created should enjoy the same hospitable treatment as is accorded to rights that flow from other areas of the Constitution. *It is as important that a meritorious invention be upheld as it is that a nonmeritorious grant be struck down.* No reason appears why this Court should not recognize, as it once did, that "Patentees are a meritorious class, and all the aid and protection which the law allows, this court will cheerfully give them." *Commissioner of Patents v. Whiteley* (1866), 71 U.S. (4 Wall.) 522, 532.

Consider that the course of decision during the last three decades in this Court—and the message thereby conveyed to the courts of the land—is that a decision striking down a patent will not be reversed because it will not be reviewed.

The surprising statistic is that "whereas *33 percent* of the patents involved in infringement suits before the U. S. Courts of Appeal were invalidated in 1925-29, by 1935-39 the percentage had increased to 51 * * *." * A hand count of the decisions reported in *United States Patent Quarterly* during the 12 months ended November 1, 1970, reveals that 66⅔% of the patents involved in infringement suits before United States Courts of Appeals were held invalid.

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* *Invention and Economic Growth*, by Jacob Schmookler, Harvard University Press, 1966, page 31.

It does not appear possible to explain these figures on the ground that the inventors who toiled hard to make and report their discoveries, at a considerable cost of time and money, were fools, or that the patent examiners who allowed those patents were knaves.

Nor are these figures explainable on the ground the Patent Office had taken to granting patents in recklessly increasing numbers. The fact is that during this progression of disaster in the courts—notwithstanding advances in all areas of knowledge which, one would suppose, would have been accompanied by increase in patentable discoveries—the patents granted in the United States show only relatively small variation from one period to another. The average number of patents granted in recent years differs little from the average number granted in the five-year period 1925-1929, despite the great growth in the economy, in technology, in population, and in knowledge. The average in fact dropped considerably below that level during the 1930's and 1940's,[9] before the Patent Act of 1952 gave new encouragement to inventors and developers. But such patents as are issued are being adjudged invalid in unprecedented numbers without any real regard to the standards of *Graham* (1965), 383 U.S. 1, and *United States v. Adams* (1966), 383 U.S. 39.

This condition of affairs cries for inspection by this Court, and pronouncement of guides to courts below. Observe, for example, the lament of Chief Judge Devitt in *Woodstream Corporation v. Herter's, Inc.* (D.C., Minn., 1970), 312 F. Supp. 369:

> "The courtrooms within the province of the Eighth Circuit Court of Appeals do not afford a congenial

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[9] *Invention and Economic Growth*, page 230, reporting figures from *Historical Statistics of the United States*, 1960 ed., Series W-69.

> forum to the holder of a United States patent. A reading of the decided cases clearly reflects this. It is especially true since 1966 following the Supreme Court's expressions in *Graham v. John Deere Co.*, 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545. I can find no record of the Eighth Circuit Court of Appeals upholding the validity of a patent since *Graham*." 312 F. Supp. at 370.

The case at bar is a particularly good example of the need for guidance. Here is an invention that, by any measure one can devise, is meritorious. The invention has won worldwide acclaim. But in the courts below it has been destroyed *by standards in applying Section 103 that would destroy any invention.*

It is always possible, by hindsight, to point to bits and pieces and then say, as did the courts below, that what cost painful toil "*should have been* obvious." 280 F. Supp. at 681, Appendix page 29. Hindsight has made "obvious" what was not so—even to those skilled in the art—until these inventors pointed the way. That for which Congress, carrying out the constitutional command, has said a patent *shall be granted*—is taken away.

This is to put a blight on all invention. It is to take from one and give to another; it is to take from one who has produced by the ingenuity of his efforts, and give to him who, unable to produce the product on his own, has appropriated the fruit of the other's work.

CONCLUSION.

The writ most surely should issue.

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